

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	

COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY

October 4, 2004

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COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY

The Tennessee Regulatory Authority (“Authority” or “TRA”) submits these comments in response to the Order and Notice of Proposed Rulemaking released on August 20, 2004 by the Federal Communications Commission (“Commission”) regarding the establishment of alternative unbundling rules pursuant to 47 U.S.C Sections 251(c) and 251(b)(2) of the Communications Act of 1934, as amended. Throughout these comments the TRA provides summaries of state proceedings that occurred in Tennessee in response to the Commission’s Triennial Review Order (“TRO”) and filings by the TRA in opposition to the Emergency Petition for Declaratory Ruling and Preemption of State Action in WC Docket No. 04-245.

The Authority opened four formal dockets in response to the TRO, appointing a Hearing Officer and establishing a procedural schedule in each docket. Procedurally, each docket reached a different point as noted in the summaries provided. An evidentiary hearing nor a decision were ever commenced in any docket. Nevertheless, on March 30, 2004, the parties did present an overview of their positions and the evidence supporting those positions at that point in time. No final orders were entered and no appeals were taken from any action by the TRA.

I. Summary of Docket No. 03-00460 : Implementation of the Federal Communications Commission's Triennial Review Order

Docket No. 03-00460 was opened by unanimous vote of Chairman Deborah Taylor Tate, director Pat Miller, Director Sara Kyle and Director Ron Jones at the regularly scheduled Authority Conference on June 16, 2003. Chairman Tate was appointed Hearing Officer in this docket. On August 19, 2003, Chairman Tate, acting as Hearing Officer, issued an Order directing all parties interested in participating in the 90-day proceeding to file within seven days of the issuance of the TRO (1) a petition to intervene or (2) a notice indicating that the party wishes to remain in the service list to receive related notices and orders. (See Exhibit No. 1). It was determined that on the seventh day after the TRO release, the Hearing Officer would meet with interested parties to discuss scheduling and procedural issues.¹ On August 22, 2003, the Hearing Officer issued a Notice announcing a meeting on August 28.²

On August 26, 2003, BellSouth Telecommunications, Inc. ("BellSouth") submitted an Emergency Motion in this docket and in Docket No. 03-00119,³ in which it requested the Authority to defer consideration of several issues in the *DeltaCom Arbitration* to the TRO docket. Several parties filed petitions to intervene in this docket, but ultimately, those petitions were re-directed into the respective TRO dockets. On August 26, 2003, United Telephone-Southeast, Inc., Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a/Sprint PCS (jointly "Sprint") filed a Petition to Intervene. On August 28, 2003, BellSouth, the Consumer Advocate & Protection Division of the Office of the Attorney General ("Consumer Advocate"),

¹ See Order Directing Interested Parties to File Petition to Intervene (August 19, 2003).

² See Notice of Meeting (August 22, 2003).

³ In re: Petition For Arbitration of ITC DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Docket No. 03-00119, (hereinafter *DeltaCom Arbitration*).

CompSouth,⁴ MCImetro Access Transmission Services, LLC and Brooks Fiber Communication of Tennessee, Inc. ("MCI"), AT&T Communications of the South Central States, LLC ("AT&T"), and the Electric Power Board of Chattanooga filed petitions to intervene in this docket. Also on August 28, 2003, the following parties filed letters requesting to remain on the service list of this docket: Time Warner Telecom of the Mid-South, LLC, Citizens Telecommunications Company of Tennessee, LLC, TDS Telecom, and Qwest Communications, Inc.

A public hearing was held in this docket on August 28, 2003 during which the Hearing Officer announced that she had caused Docket Nos. 03-00490⁵ and 03-00491⁶ to be opened.⁷ On September 3, 2003, Qwest Communications, Inc. filed a letter indicating that it wished to monitor the proceedings. During a public hearing on September 22, 2003, the Chairman caused Docket 03-00527 to be opened for the purpose of addressing loop and transport issues.

During an Authority Conference held on March 22, 2004, the panel voted unanimously to suspend the docket, admit all testimony into the record and hear presentations from the parties in this docket.⁸ On March 26, 2004, the Hearing Officer issued a Notice⁹ announcing a hearing on March 30, 2004 in Docket Nos. 03-00491, 03-00526¹⁰ and 03-00527.¹¹ On March 30, 2004, a

⁴ CompSouth includes the following companies: Access Integrated Networks, Inc., MCI, Birch Telecom, Business Telecom, Inc., Covad Communications Company, AT&T, NewSouth Communications Corp., Talk America, Nuvox Communications, Inc., ITC^DeltaCom, Xspedius Communications, Momentum Business Solutions, Cinergy Communications Company, Network Telephone Corp., KMC Telecom, Z-Tel Communications, Inc. and IDS Telecom LLC

⁵ See *In Re: Implementation of the Federal Communications Commission's Triennial Review Order - 90 Day Proceeding*, Docket No. 03-00490. Directors Kyle, Miller and Jones were assigned to this docket.

⁶ See *In Re: Implementation of the Federal Communications Commission's Triennial Review Order - 9 Month Proceeding --Switching*, Docket No. 03-00491. Directors Tate, Miller and Jones were assigned to this docket.

⁷ Transcript of Authority Conference, pp. 7 and 11 (August 28, 2003).

⁸ Transcript of Authority Conference, pp. 17 and 24 and (March 22, 2004).

⁹ See *Notice of Hearing* (March 26, 2004).

¹⁰ See *In Re: Triennial Review Order - 9 Month Proceeding - Hot Cuts*, Docket No. 03-00526. Directors Kyle, Tate and Miller were assigned to this docket.

¹¹ See *In Re: Triennial Review Order - 9 Month Proceeding - Loop And Transport*, Docket No. 03-00527. Directors Tate, Miller and Jones were assigned to this docket.

public hearing was held during which the parties presented summaries of their positions. (See Exhibit Nos. 3 and 4).¹²

II. Summary of Docket No. 03-00490: Implementation of the Federal Communications Commission's Triennial Review Order - 90 Day Proceeding

On August 19, 2003, Chairman Tate, acting as Hearing Officer, issued an Order directing all parties interested in participating in the 90-day proceeding to file within seven days of the issuance of the TRO (1) a petition to intervene or (2) a notice indicating that the party wishes to remain in the service list to receive related notices and orders. It was determined that on the seventh day after the TRO release, the Hearing Officer would meet with interested parties to discuss scheduling and procedural issues. On August 26, 2003, Sprint filed a Petition to Intervene and on August 28, 2003, BellSouth, the Consumer Advocate, CompSouth¹³, MCI, AT&T, and the Electric Power Board of Chattanooga filed petitions to intervene. On August 28, 2003, Time Warner Telecom of the Mid-South, LLC, Citizens Telecommunications Company of Tennessee, LLC, TDS Telecom, and Qwest Communications, Inc. filed letters requesting to remain on the service list of this docket.

On September 5, 2003, BellSouth filed a letter proposing that any party desiring to put on a case to rebut the FCC's finding of no impairment for unbundled access to local switching for DS1 loops file a notice with the Authority by September 24, 2003. On the same date, CompSouth and AT&T filed a letter supporting BellSouth's proposal and announcing that neither AT&T nor CompSouth intended to seek a waiver from the FCC of its finding of no impairment for access to unbundled local switching for DS1 loops.

¹² Transcript of Hearing (March 30, 2004).

¹³ CompSouth included Access Integrated Networks, Inc., MCI, Birch Telecom, Business Telecom, Inc., Covad Communications Company, AT&T, NewSouth Communications Corp., Talk America, Nuvox Communications, Inc., ITC^DeltaCom, Xspedius Communications, Momentum Business Solutions, Cinergy Communications Company, Network Telephone Corp., KMC Telecom, Z-Tel Communications, Inc. and IDS Telecom LLC

During a regularly convened Authority Conference on September 8, 2003, Director Kyle was appointed Hearing Officer by unanimous vote of the panel.¹⁴ On September 24, 2003, the Authority issued an *Amended Notice* identical to the above but establishing the due date for filing of petitions no later than September 26, 2004. No party sought intervention in this docket.

On September 29, 2003, Director Kyle, acting as Hearing Officer, issued a *Report and Recommendation* stating that, because no party had intervened in the docket, the Authority should decline to continue with the 90-day proceeding and instead should close this docket. During the October 6, 2003 Authority Conference, the panel voted unanimously to accept the Hearing Officer's *Report and Recommendation*.¹⁵ On October 21, 2003, an *Order Approving the Report and Recommendation of Hearing Officer* was issued, confirming that the Authority declined to seek a waiver of the FCC's presumption of no impairment for enterprise switching. (See Exhibit No. 2)

III. Summary of Docket No. 03-00526: Triennial Review Order-9 Month Proceeding-Hot Cuts

Docket No. 03-00526 was opened by unanimous vote of the panel at the regularly scheduled Authority Conference on October 6, 2003 for the purpose of approving a batch cut migration process to be implemented by incumbent local exchange carriers ("LECs") in Tennessee to address the costs and timeliness of the hot cut process. The Authority appointed Director Sara Kyle as the Hearing Officer. The following entities requested and were granted intervention by order of the Hearing Officer on November 3, 2003: DIECA Communications, Inc. d/b/a/ Covad Communications Company ("Covad"); Sprint; ITC^DeltaCom Communications, Inc.; AT&T; MCI; CompSouth; BellSouth; the Consumer Advocate; Electric

¹⁴ The voting panel consisted of Directors Kyle, Miller and Jones.

¹⁵ Transcript of Authority Conference, pp. 20-21 (October 6, 2003).

Power Board of Chattanooga; New South Communications Corp. ("New South"); and Birch Telecom of the South. Inc. ("Birch").

On October 15, 2003, BellSouth filed a proposal designed to provide a method of obtaining information from carriers that elected not to participate in this Docket. BellSouth proposed two alternatives to facilitate obtaining relevant discovery of this type. The first method proposed that the Authority declare that all carriers having a certificate of authority in Tennessee would be parties to these proceedings for the limited purpose of discovery so the interveners could serve written discovery on those carriers electing not to intervene. The second method proposed simply to authorize the intervening parties to obtain information from other carriers regarding their facilities and operations through the issuance of subpoenas pursuant to Authority Rules 1220-1-2-.13, *Subpoenas and Subpoenas Duces Tecum*. BellSouth recommended the latter alternative because it relied on an existing Rule and the Authority would not be required to take any action other than to issue the subpoenas and enforce them should a non-party refuse to respond. Although no occasion arose in this Docket that required the use of either alternative, the second alternative was used in Dockets Nos. 03-00491 and 03-00527.

On November 21, 2003, the Hearing Officer issued an *Order Establishing Procedural Schedule* in this Docket setting March 29, 2004 through April 2, 2004 as the hearing dates in this matter. Pursuant to this schedule, the parties filed interrogatories and requests for production of documents.

On December 18, 2003 the TRA hosted a Hot Cut workshop. The workshop featured presentations by BellSouth and AT&T including a discussion on BellSouth's UNE-P to UNE-L migration process. The workshop also included hot cut demonstrations at a BellSouth central office and at an AT&T switch.

On March 10, 2004, BellSouth filed a letter recommending suspension of proceedings in light of the decision of the D.C. Circuit Court of Appeals in *United States Telecom Ass'n v. FCC*¹⁶ ("USTA II"). CompSouth urged the Authority to continue with the Docket. During the March 22, 2004 Authority Conference the voting panel in this Docket as well as those panels in Docket Nos. 03-00491 and 03-00527 decided to suspend indefinitely the remainder of the procedural schedule for hearings and post hearing briefs in those dockets and to hold a hearing for the limited purposes of the submitting into the record the pre-filed testimony and exhibits, discovery and excerpts of the record of similar proceedings in Florida and Georgia. Additionally, the parties were instructed to make presentations which included an overview of the evidence filed in this docket and a discussion of the impact of UTSA II on the TRO as well as the Authority's obligations under the TRO. This hearing was held on March 30, 2004 in the general docket (No. 03-00460).

IV. Summary of Docket No. 03-00527: Triennial Review Order-9 Month Proceeding-Loop & Transport

Docket No. 03-00527 was opened by unanimous vote of the panel at the regularly scheduled Authority Conference on September 22, 2003. The Authority appointed Director Miller as Hearing Officer on October 21, 2003. Covad; KMC Telecom III, LLC ("KMC"); Sprint; AT&T; MCI; CompSouth¹⁷; BellSouth; Xspedius Communications, LLC ("Xspedius"); the Consumer Advocate; New South; and Birch requested and were granted intervention by order of the Hearing Officer on November 6, 2003.

¹⁶ 359 F.3d 554 (D.C. Cir. 2004).

¹⁷ CompSouth included Access Integrated Networks, Inc., MCI, Birch Telecom, Business Telecom, Inc., Covad Communications Company, AT&T, NewSouth Communications Corp., Talk America, Nuvox Communications, Inc., ITC^DeltaCom, Xspedius Communications, Momentum Business Solutions, Cinergy Communications Company, Network Telephone Corp., KMC Telecom, Z-Tel Communications, Inc. and IDS Telecom LLC.

On October 15, 2003, BellSouth filed a proposal designed to provide a method of obtaining information from carriers that elected not to participate in this Docket. BellSouth proposed two alternatives to facilitate obtaining relevant discovery of this type. The first method proposed was for the Authority to declare all carriers having a certificate of authority in Tennessee parties to these proceedings for the limited purpose of discovery so the interveners could serve written discovery on other carriers electing not to intervene. The second alternative proposed was to simply authorize the parties to obtain information from other carriers regarding their facilities and operations through the issuance of subpoenas pursuant to Authority Rules 1220-1-2-.13, *Subpoenas and Subpoenas Duces Tecum*. BellSouth recommended the latter alternative because it relied on an existing Rule and the Authority would not need to take any other action except to issue the subpoenas and enforce them should a non-party refused to respond. The second alternative was used in this Docket as well as Docket No. 03-00491.

On October 27, 2003, the Hearing Officer issued an *Order Establishing Procedural Schedule* in this Docket setting February 17, 2004 through February 20, 2004 as the hearing dates in this matter. Pursuant to this schedule, the parties filed interrogatories and requests for production of documents. On November 13, 2003 an Order was issued suspending the procedural schedule and on December 22, 2003 an additional Order was issued modifying the procedural schedule requiring the hearing dates to be set on March 29, 2004 through April 2, 2004.

On March 10, 2004, BellSouth filed a letter recommending suspension of proceedings in light of the DC Circuit Court of Appeals' recent Order in the USTA II decision. CompSouth urged the Authority to continue with the Docket. During the March 22, 2004 Authority Conference the voting panel in this Docket, as well as those in Docket Nos. 03-00491, 03-00526

and 03-00527, decided to suspend indefinitely the remainder of the procedural schedule for hearings and post hearing briefs in all these dockets and to hold a hearing for the limited purposes of the submitting into the record the pre-filed testimony and exhibits, discovery and excerpts of the record of similar proceedings in Florida and Georgia. Additionally, the parties were instructed to make presentations which included an overview of the evidence filed in this Docket and a discussion of the impact of UTSA II on the TRO as well as on the Authority's obligations under the TRO. This hearing was held on March 30, 2004 in the general docket (No. 03-00460).

V. TRA Filings in FCC Proceeding WC Docket No. 04-0245

In addition to the above summaries of the TRO dockets before the Authority, the TRA submits copies of filings it made in opposition to the *Emergency Petition for Declaratory Ruling and Preemption of State Actions* ("Petition") filed by BellSouth in WC Docket No. 04-245 on July 1, 2004. In its Petition, BellSouth is asking the FCC to preempt a decision of the TRA which determined that (1) market-based rates apply to Section 271 elements; (2) market-based rates must be just and reasonable; (3) just and reasonable rates cover the utility's operating expenses as well as a fair return on investments; (4) BellSouth did not produce a stand-alone switching rate in response to the request for final best offers ("FBOs"); (5) BellSouth failed to establish the criteria set forth in paragraph 664 of the TRO; and (6) a true-up and generic docket will commence to foster negotiations and allow all interested parties to provide input.

In opposing BellSouth's Petition, the TRA has stated that switching issues can be properly deliberated by the TRA as a part of its responsibilities under 47 U.S.C. § 252 and the TRA has authority under federal and state law to establish rates for switching.¹⁸ The TRA

¹⁸ See attached, *Opposition of the Tennessee Regulatory Authority to BellSouth's Emergency Petition* (Exhibits 5) and *Reply of the Tennessee Regulatory Authority in Opposition to BellSouth's Emergency Petition* (Exhibit 7).

submits Exhibits 5, 6 and 7 in response to Footnote 38 of the FCC's Order and Notice of Proposed Rulemaking in this docket and in support of its position that the FCC should not assert exclusive jurisdiction over the enforcement of Section 271 or preempt the TRA's decision asserting such jurisdiction.

Respectfully submitted,


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